Filed 7/15/19 McKillop v. Wallace CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

HAZEL MCKILLOP, Plaintiff and Appellant, v. OLUKEMI WALLACE, Defendant and Respondent.	B283783 (Los Angeles County Super. Ct. No. YC070181)

APPEAL from a judgment and postjudgment order of the Superior Court of Los Angeles County, Stuart M. Rice, Judge. Dismissed in part, affirmed in part.

Onwaeze Law Group and Ogochukwu Victor Onwaeze for Plaintiff and Appellant.

Law Offices of Edi M.O. Faal and Renée L. Campbell for Defendant and Respondent.

I. INTRODUCTION

Plaintiff Hazel McKillop, M.D. appeals from a judgment after a court trial in her favor and a postjudgment order awarding attorney fees.[1] McKillop and Innley Medical Group sued defendants Olukemi Wallace, M.D. and Healing Hands Oncology and Medical Care, Inc. (Healing Hands), a California corporation that was 100 percent owned by Wallace, for breach of contract.[2]

McKillop contends that the trial court erred in granting Wallace's motion for summary adjudication, granting in part Wallace's motion for attorney fees, and denying in part her motion for attorney fees. Wallace moves to dismiss McKillop's appeal because McKillop failed to file a notice of appeal when the trial court issued a second amended judgment, which Wallace contends superseded the earlier judgment from which McKillop did timely appeal. We deny Wallace's motion to dismiss the appeal, affirm the court's granting of summary adjudication, and dismiss McKillop's appeal of the attorney fees award.

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[1] In her opening brief, McKillop identifies Innley Medical Group as an appellant. Both McKillop and Innley Medical Group were plaintiffs below. But only McKillop filed a notice of appeal. References to "plaintiffs" refer to both McKillop and Innley Medical Group.

[2] Healing Hands was a defendant below, but only Wallace was identified as a respondent on appeal.

II. BACKGROUND

This dispute relates to the breach of an agreement for the sale of assets and stock of Innley Medical Group. The parties entered into four agreements, which were all executed on November 30, 2012, and which we will describe further below: the Stock Purchase Agreement; the Stock Pledge Agreement; the Asset Purchase Agreement; and the Promissory Note. McKillop owned 100 percent of Innley Medical Group. Wallace owned 100 percent of Healing Hands. The buyer or buyers agreed to purchase two-thirds of Innley Medical Group's stock and assets. The parties dispute whether Wallace and Healing Hands, or Healing Hands only, entered into the agreements. McKillop alleged Wallace and Healing Hands, as the buyers, failed to make monthly payments that were due under the agreements, and refused to pay the entire balance due.

On August 27, 2015, plaintiffs filed the first amended complaint against Wallace and Healing Hands, asserting causes of action for breach of contract and common count on an open book account.

On July 14, 2016, Wallace moved for summary adjudication on plaintiffs' first and second causes of action against her, arguing that Healing Hands was the buyer and that she was not a party to the Stock Purchase Agreement and the Stock Pledge Agreement. On October 26, 2016, the trial court granted Wallace's motion. The court granted plaintiffs leave to file a second amended complaint. On October 26, 2016, plaintiffs filed a second amended complaint in which they substituted Healing Hands in place of Wallace.

On December 14, 2016, Wallace filed a motion for attorney fees for prevailing on her motion. McKillop opposed the motion.

The matter proceeded to a court trial against Healing Hands on January 31, 2017, and February 1, 2017. On May 9, 2017, the trial court issued its judgment in favor of plaintiffs against Healing Hands on the second amended complaint, and in favor of Healing Hands on a cross-complaint.[3] Overall, the trial court found plaintiffs were the prevailing party.

On May 4, 2017, prior to issuance of the May 9, 2017, judgment, McKillop moved for attorney fees in the amount of $312,950 pursuant to an attorney fees clause in both the Stock Purchase Agreement and the Stock Pledge Agreement. Healing Hands opposed the motion.

On May 30, 2017, the trial court heard the parties' attorney fees motions. On June 5, 2017, the trial court issued its ruling and granted McKillop's and Wallace's motions in part. The trial court reduced both parties' calculation of hours and found a rate of $400 per hour to be reasonable for both parties. McKillop was awarded $138,960 in attorney fees against Healing Hands, and Wallace was awarded $56,360 in attorney fees against McKillop.

On July 10, 2017, McKillop filed her notice of appeal. McKillop indicated in the notice that she appealed from the judgment entered on May 9, 2017. The June 5, 2017, attorney fees order was not listed or referenced in the notice of appeal. On

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[3] Healing Hands filed a cross-complaint against McKillop and Innley Medical Group. The cross-complaint is not included in the record. McKillop states that Wallace filed the cross-complaint but the trial court's judgment refers to Healing Hands as the only cross-complainant.

July 14, 2017, the trial court issued an amended judgment reflecting its ruling on the attorney fees motions.

On May 17, 2018, the trial court heard plaintiffs' motion to amend the judgment to add Wallace as a judgment debtor under the theory that Wallace was the alter ego of Healing Hands. On July 17, 2018, the trial court issued a second amended judgment, adding Wallace as a judgment debtor on the second amended complaint.[4]

III. DISCUSSION

A. *Second Amended Judgment Did Not Supersede Original Judgment*

Wallace moves to dismiss the appeal, asserting that the second amended judgment superseded the May 9, 2017, judgment. According to Wallace, because the May 9, 2017, judgment was superseded, there is no proper appeal before this court. We disagree.

"'When the trial court amends a nonfinal judgment in a manner amounting to a *substantial modification* of the judgment (e.g., on motion for new trial or motion to vacate and enter different judgment), the amended judgment supersedes the original and becomes the appealable judgment (there can only be

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[4] Wallace requested judicial notice of the second amended judgment entered on July 17, 2018, and her notice of appeal from the second amended judgment, filed September 14, 2018. The request for judicial notice is granted. Wallace filed a notice of appeal from this second amended judgment. (*McKillop v. Wallace* (B292898, app. pending).)

one "final judgment" in an action . . .). Therefore, a new appeal period starts to run from notice of entry or entry of the *amended* judgment.' [Citation.] 'For example, an order amending a judgment to reflect the *correct name of a party* . . . substantially changes the judgment and therefore starts a new appeal time period (for an appeal from the amended judgment).'" (*Torres v. City of San Diego* (2007) 154 Cal.App.4th 214, 222 (*Torres*).) A substantial modification is one that materially affects the rights of the parties. (*Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 765; *Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 505.)

According to Wallace, the second amended judgment, which added her as a judgment debtor, constituted a substantial modification. She cites in support *Torres*, which itself relied upon the holding in *CC-California Plaza Assocs. v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042, 1049 (*CC-California Plaza*). (*Torres, supra*, 154 Cal.App.4th at p. 222.) *Torres* is inapposite as the court in that case concluded that a postjudgment order awarding attorney fees did not substantially modify the judgment. (*Ibid.*) The holding in *CC-California Plaza* is also unavailing. Although the court held, "we cannot imagine a more substantial or material change in the form of a judgment than in the identity of the losing party" (*CC-California Plaza, supra*, 51 Cal.App.4th at p. 1049), the order at issue there amended the judgment to change the identity of the losing party, and did not address an alter ego theory of liability. (*Ibid.* [losing party amended from contractor to party who received indemnity rights by assignment from contractor].)

We conclude that here, the order amending the judgment to add a judgment debtor under an alter ego theory was not a

substantial modification. "[A]mending a judgment to add an alter ego does not add a new defendant but instead inserts the correct name of the real defendant." (*Misik v. D'Arco* (2011) 197 Cal.App.4th 1065, 1072; accord, *Leek v. Cooper* (2011) 194 Cal.App.4th 399, 419; *Greenspan v. LADT LLC* (2010) 191 Cal.App.4th 486, 508; see also Code Civ. Proc., § 187 [trial court given all means necessary to carry into effect its jurisdiction].) Adding a party alter ego as a judgment debtor is "'merely inserting the correct name of the real defendant.'" (*Leek v. Cooper, supra*, 194 Cal.App.4th at p. 419.) Adding a judgment debtor under an alter ego theory is thus not a substantial modification to a judgment. Plaintiffs' rights against Healing Hands remain the same from the May 9, 2017, judgment to the July 17, 2018, second amended judgment. The difference between the judgment and the second amended judgment is that plaintiffs can also recover against Wallace as an alter ego of Healing Hands. In other words, the second amended judgment did not materially affect plaintiffs' rights against Healing Hands. Accordingly, the second amended judgment entered July 17, 2018, does not supersede the judgment entered May 9, 2017.[5] Wallace's motion to dismiss is denied.

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[5] We do not intend to suggest that Wallace could not appeal from the amended judgment, which is a separate appealable order. (*Misik v. D'Arco*, *supra*, 197 Cal.App.4th at p. 1071.)

B. *Trial Court Did Not Err in Granting Summary Adjudication*

We now discuss the merits of the summary adjudication motion.

1. Agreements

As we noted briefly above, the parties entered into four agreements on November 30, 2012: the Asset Purchase Agreement; the Promissory Note; the Stock Purchase Agreement; and the Stock Pledge Agreement. In her first amended complaint, McKillop claimed that Wallace breached the Stock Purchase Agreement and the Stock Pledge Agreement by failing to make monthly $7,000 payments. McKillop asserted she exercised her option under the agreements for Wallace's alleged payment default to demand the entire balance in full and immediately, but Wallace did not pay.

The Stock Purchase Agreement and the Stock Pledge Agreements, in their respective first paragraphs, stated that they were between McKillop and Wallace as individuals. In the Stock Purchase Agreement, McKillop, who was described as "the Shareholder," agreed to sell 67 percent of the common capital stock of Innley Medical Group to Wallace, who was described as the "Buyer," for the amount of $350,000. The contract further provided that "[t]he purchase price shall be evidenced by the Buyer's promissory note in the principal sum of three hundred and fifty thousand dollars ($350,000.00) in the form attached hereto, dated as of the closing [date] . . . ." Pursuant to the Stock Pledge Agreement, Wallace, who was identified as "the Pledgor,"

agreed to grant a security interest in the purchased stock to McKillop, who was described as "the Secured Party," to secure the Pledgor's performance of the promissory note. However, the Promissory Note, which was executed on the same date, and apparently was attached to the Stock Purchase Agreement, stated that it was between "Innley Medical Group (the 'Lender')" and "Healing Hands . . . (the 'Borrower')." The only reference to Wallace in the Promissory Note appeared in the signature line above the term "Authorized Signature," which Wallace signed as the "Medical Director."

Further, the Stock Purchase Agreement provided that notice to the "Buyer" was effective if given to "Healing Hands Oncology & Medical Care, Inc.," without mention of Wallace. The Stock Pledge Agreement also stated that notice to the "Pledgor" should be given to "Olukemi Wallace for [¶] Healing Hands Oncology & Medical Care, Inc." Furthermore, at the signature portion for the Buyer and Pledgor of the Stock Purchase and Stock Pledge Agreements, Wallace signed and wrote "Healing Hands Oncology & Medical Care, Inc." under her signature.

2. Analysis

"A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants

either owed or did not owe a duty to the plaintiff or plaintiffs." (Code Civ. Proc., § 437c, subd. (f)(1); *Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 950.)

"'A defendant making the motion for summary adjudication has the initial burden of showing that the cause of action lacks merit because one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. [Citations.] If the defendant fails to make this initial showing, it is unnecessary to examine the plaintiff's opposing evidence and the motion must be denied. However, if the moving papers establish a prima facie showing that justifies a judgment in the defendant's favor, the burden then shifts to the plaintiff to make a prima facie showing of the existence of a triable material factual issue.' [Citation.] 'A prima facie showing is one that is sufficient to support the position of the party in question.'" (*Rehmani v. Superior Court, supra*, 204 Cal.App.4th at p. 950; Code Civ. Proc., § 437c, subd. (p)(2).) "In reviewing an order granting summary adjudication of an issue, we apply the same de novo standard of review that applies to an appeal from an order granting summary judgment." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 363; *Rehmani v. Superior Court, supra*, 204 Cal.App.4th at pp. 950-951.)

The parties dispute whether the breach of contract cause of action against Wallace was meritless because she was not a party to the agreements.[6] This is an issue of contract interpretation.

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[6] The cause of action for common count here was also premised on those agreements, and was used as an alternative means of seeking the same recovery demanded in the breach of contract cause of action. Thus, the common count "must stand or fall with [the] first cause of action [for breach of contract]."

"The interpretation of a contract is a judicial function. [Citation.] In engaging in this function, the trial court 'give[s] effect to the mutual intention of the parties as it existed' at the time the contract was executed. [Citation.] Ordinarily, the objective intent of the contracting parties is a legal question determined solely by reference to the contract's terms. . . . [¶] The court generally may not consider extrinsic evidence of any prior agreement or contemporaneous oral agreement to vary or contradict the clear and unambiguous terms of a written, integrated contract. (Code Civ. Proc., § 1856, subd. (a) . . . .) Extrinsic evidence is admissible, however, to interpret an agreement when a material term is ambiguous. ([*Id.*], § 1856, subd. (g) . . . .)" (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1125-1126.)

"The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine 'ambiguity,' i.e., whether the language is 'reasonably susceptible' to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is 'reasonably susceptible' to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract." (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165; accord, *Salehi v. Surfside III Condominium Owners Assn.* (2011) 200 Cal.App.4th 1146, 1159.) "The trial court's ruling on the threshold determination of 'ambiguity' (i.e., whether the proffered evidence is relevant to prove a meaning to which the language is

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(*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 395; accord, *Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1559-1560.)

reasonably susceptible) is a question of law, not fact. [Citation.] Thus the threshold determination of ambiguity is subject to independent review." (*Winet v. Price, supra*, 4 Cal.App.4th at p. 1165.)

In her motion for summary adjudication, Wallace argued that the parties intended for Healing Hands to be the Buyer and the Pledgor of the Stock Purchase and Stock Pledge Agreements, respectively. The trial court found an ambiguity on the face of the agreements without resorting to consideration of the extrinsic evidence produced.

The Stock Purchase and Stock Pledge Agreements are ambiguous as to whether they had been entered into by Wallace or Healing Hands. While it is undisputed the agreements listed Wallace as the Buyer and Pledgor, other provisions suggested that the correct party was Healing Hands. The notice provision of the Stock Purchase Agreement provided for notice to Healing Hands only, and the Stock Pledge Agreement provided for notice to "Olukemi Wallace for [¶] Healing Hands . . . ." Both the Stock Purchase and the Stock Pledge Agreements referred to a promissory note that would secure payment by the Buyer or Pledgor, respectively, but the Promissory Note referenced the parties as Innley Medical Group and Healing Hands. Finally, Wallace signed the Stock Purchase and Stock Pledge Agreements and wrote her company's name below her signature, suggesting that Healing Hands was the signatory, not Wallace. (See *Carlesimo v. Schwebel* (1948) 87 Cal.App.2d 482, 488 [individual's signature immediately above corporate name was ambiguous as to which party signed contract, the individual or the corporation].) Accordingly, the identity of the Buyer and the Pledgor of the Stock Purchase and Stock Pledge Agreements was

ambiguous and reasonably susceptible to Wallace's interpretation that the correct party was Healing Hands. Extrinsic evidence was thus admissible to interpret the contracts.

"The second step—the ultimate construction placed upon the ambiguous language—may call for differing standards of review, depending upon the parol evidence used to construe the contract. . . . However, when no parol evidence is introduced (requiring construction of the instrument solely based on its own language) or when the competent parol evidence is not conflicting, construction of the instrument is a question of law, and the appellate court will independently construe the writing." (*Winet v. Price, supra*, 4 Cal.App.4th at pp. 1165-1166.) We begin by examining whether Wallace met her burden of production that the extrinsic evidence supported her interpretation. (*Rehmani v. Superior Court, supra*, 204 Cal.App.4th at p. 950; Code Civ. Proc., § 437c, subd. (p)(2).)

In support of her motion, Wallace produced McKillop's deposition testimony, in which McKillop stated that she understood Healing Hands was the buyer of the Innley Medical Group stock and assets: "Q. Okay. So is it true that—was it your understanding that the transaction you were entering in included the sale of assets and the sale of stock? Was it your understanding that the buyer was Healing Hands . . . for both the sale of assets and the sale of stock? [¶] A. The stock representing these? [¶] Q. Yes. [¶] A. Yes. [¶] That the seller was Innley Medical and the buyer of both the assets and the stock was Healing Hands Medical? [¶] A. Right." (Boldface omitted.) Wallace also produced her own declaration, in which she declared that Healing Hands was the intended buyer of the Innley Medical Group stock and assets. Because the purpose of

contract interpretation is to give effect to the intent of the contracting parties (Civ. Code, § 1636), and because extrinsic evidence is admissible to resolve the ambiguity here (Code Civ. Proc., § 1856, subd. (g)), Wallace met her initial burden of production to demonstrate that the parties intended for Healing Hands, not Wallace, to be the buyer of the Innley Medical Group stock and assets. The burden thus shifted to McKillop to raise a triable issue of material fact. (*Rehmani v. Superior Court, supra*, 204 Cal.App.4th at p. 950; Code Civ. Proc., § 437c, subd. (p)(2).)

McKillop contends she met her burden by citing to a July 13, 2012, email from McKillop's counsel to Wallace, which attached drafts of the Stock Purchase Agreement and Stock Pledge Agreement. McKillop asserts that Wallace had the opportunity to correct the agreements regarding the identity of the Buyer and the Pledgor, but failed to do so. She suggests that by failing to correct the agreements, Wallace conceded she was the intended party to the agreements. McKillop's argument ignores evidence that Wallace did try to correct the agreements and believed they had been changed. At a deposition, Wallace testified that: "I've always told [McKillop] that it's supposed to be Healing Hands and also those Olukemi Wallace on those line items, was supposed to have been changed to Healing Hands. [¶] And I believe they were changed, but I don't know how they got reverted back." Wallace also testified, "I thought I updated it. That's why I'm surprised that it has still have [sic] Olukemi Wallace, M.D., Individual[]. [¶] . . . [¶] Based on my various conversations with [McKillop], Healing Hands was going to be the person. . . . [¶] So I printed it and gave them to her. And so when she came the next day I thought it was Healing Hands on it. That was the only thing. I didn't make changes to the body of

the contract. She and I agreed that it would be Healing Hands." Wallace's deposition testimony is consistent with McKillop's deposition testimony that the parties intended for Healing Hands to be the Buyer and Pledgor. Wallace's failure to correct the language in the draft agreements therefore does not raise a triable issue of material fact.

McKillop also argues that an October 16, 2012, email exchange between McKillop and Wallace raised a triable issue of material fact. In the email exchange, McKillop expressed her discomfort with Wallace suggesting a "lien" be put on her corporation Healing Hands rather than on Wallace's house. The October 16, 2012, emails fail to raise a triable issue. Wallace's deposition testimony indicated that the matter was subsequently resolved: "[W]e resolved this because I spoke with [McKillop], with the accountant who was actually her agent at that time, and he told her that you cannot go after [Wallace's] house as an individual, it's a corporation that is buying it and that's [sic] a corporation that will hold the collateral." Whatever discomfort McKillop expressed about who would "hold the collateral" prior to the signing of the agreements is not a material triable controversy that would contradict Wallace's evidence that the parties intended for Healing Hands to be the Buyer and Pledgor.

In sum, Wallace demonstrated there was an ambiguity in the Stock Purchase and the Stock Pledge Agreements as to whether Healing Hands or Wallace was the Buyer and Pledgor. Wallace produced extrinsic evidence supporting her interpretation that the parties intended for the buyer of the Innley Medical Group stock and assets to be Healing Hands. Wallace met her burden of production for her summary adjudication motion. McKillop failed to produce evidence that

raised a triable issue disputing Wallace's position. Wallace met her burden of persuasion that she was not a party to the Stock Purchase Agreement and the Stock Pledge Agreement, and the causes of action for breach of contract and common count against Wallace fail as a matter of law. Accordingly, the trial court did not err by granting summary adjudication in favor of Wallace on the first and second causes of action in the first amended complaint.[7]

C. *Appeal from Attorney Fees Order Dismissed*

McKillop also seeks reversal of the attorney fees order. "Generally, '"[i]f a judgment or order is appealable, an aggrieved party must file a timely appeal or forever lose the opportunity to obtain appellate review." [Citations.]' [Citations.] Furthermore, ""[w]here several judgments and/or orders occurring close in time

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7 McKillop contends that Wallace is attempting to reform the agreements due to a mistake or fraud, but failed to raise these causes of action in her cross-complaint. We disagree for two reasons. First, as the appellant, McKillop had the burden of producing an adequate record on appeal supporting her argument (*Jameson v. Desta* (2018) 5 Cal.5th 594, 609; *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187), but failed to include the cross-complaint in the record. Second, it was unnecessary for Wallace to assert reformation of the contract pursuant to Civil Code section 3399 if there was an ambiguity in the contract. "If there is anything ambiguous in the clause [of a contract] . . . the remedy is not reformation but construction in the light of admissible testimony in aid of construction." (*Raddue v. Le Sage* (1956) 138 Cal.App.2d 852, 860; see also *Carman v. Athearn* (1947) 77 Cal.App.2d 585, 596 [ambiguity is immaterial for reformation of contract].)

are separately appealable . . . , each appealable judgment and order must be expressly specified—in either a single notice of appeal or multiple notices of appeal—in order to be reviewable on appeal."" [Citations.] This requirement circumscribes our jurisdiction to review postjudgment orders [citation]." (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1315-1316; accord, *Donohue v. AMN Services, LLC* (2018) 29 Cal.App.5th 1068, 1081; *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 1007-1008.) An order awarding or denying attorney fees is a postjudgment order that is immediately appealable under Code of Civil Procedure section 904.1, subdivision (a)(2). (*Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1015, citing *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 648; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284 ["An appellate court has no jurisdiction to review an award of attorney fees made after entry of the judgment, unless the order is separately appealed"].)

McKillop was required to specify in her notice of appeal that she sought review of the attorney fees order in order to vest this court with jurisdiction to review the order. (*Nellie Gail Ranch Owners Assn. v. McMullin, supra*, 4 Cal.App.5th at pp. 1007-1008.) McKillop's notice of appeal indicated that she appealed from the May 9, 2017, judgment only. Thus, McKillop's appeal from the attorney fees order is dismissed.

IV. DISPOSITION

The motion to dismiss the appeal is denied. The appeal from the June 5, 2017, attorney fees order is dismissed. The May 9, 2017, judgment is affirmed. Wallace is entitled to recover her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.

We concur:

RUBIN, P.J.

BAKER, J.